IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 364

J. H. SMITH RICHARDSON and LUNSFORD RICHARDSON, JR., Executors of the Last Will and Testament of Lunsford Richardson, Sr., deceased, and the VICK CHEMICAL COMPANY, a corporation organized under the laws of the State of Delaware,

Petitioners,

vs.

ROBERT R. KING, SR., ROBERT G. VAUGHN, SR., and AUBREY L. BROOKS, sole Trustees for the Home and Foreign Missions and Benevolent Causes of the Presbyterian Church under the Will of Lunsford Richardson, Sr., deceased; THE EXECUTIVE COMMITTEE OF HOME MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES, a corporation organized and existing under the laws of the State of Georgia; THE EXECUTIVE COMMITTEE OF MINISTERIAL EDUCATION AND RELIEF OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES, a corporation organized and existing under the laws of the Commonwealth of Kentucky; and THE PRESBYTERIAN COMMITTEE OF PUBLICATION, a corporation organized and existing under the laws of the State of Virginia; on behalf of themselves and all other beneficiaries, similarly situated, of the charitable trust created under Item V of the Will of Lunsford Richardson, Sr.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari be issued to review a judgment of the United States Circuit Court of

Appeals for the Fourth Circuit, which by a divided court affirmed in part and reversed in part a decree of the District Court of the United States for the Middle District of North Carolina.

Opinions Below

The opinion of Judge HAYES in the District Court (R. 132) is reported in 46 F. Supp. 510. The majority opinion of Judge PARKER (R. 263) and the dissenting opinion of Judge SOPER (R. 287) in the Circuit Court of Appeals are reported in 136 Fed. 2nd 849.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Section 347) to review the Judgment of the Circuit Court of Appeals dated June 19, 1943.

Statutes Involved

The statute involved is Section 34 of the Judiciary Act of 1789, now found in 28 U. S. C. Section 725, as construed in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

The North Carolina statutes, which the Circuit Court of Appeals failed to follow, are set forth in the Appendix hereto.

Summary Statement of the Matter Involved

A. Nature of the Suit.

This is a civil action brought in the federal court for the delivery of a legacy. Jurisdiction is based solely on diversity of citizenship (Finding 31). The action was begun on June 25, 1941 (Finding 32), and was tried before Honorable JOHNSON J. HAYES, United States District Judge, without a jury.

The plaintiffs (respondents herein) are three individuals and certain corporations affiliated with the Presbyterian Church in the United States. Said individuals are Trustees of the First Presbyterian Church of Greensboro, N. C., but sue solely as alleged Trustees of an express trust under Item Fifth of the will of the late Lunsford Richardson, Sr. The said corporations sue as alleged beneficiaries thereunder.

The petitioners herein are the two surviving executors of the said will (they are not sued individually) and the Vick Chemical Company, a Delaware corporation incorporated in 1933.

The respondents alleged that the late Lunsford Richardson, Sr., who died August 19, 1919, domiciled in Greensboro, North Carolina, by Item Fifth of his will established a charitable trust in favor of themselves and others similarly situated. The legacy in question consisted of a remainder interest in 3/100 of the stock of Vick Chemical Company (incorporated in North Carolina in 1919). The respondents alleged that 225 shares of this stock were wrongfully sold in 1921 in a probate proceeding in the Superior Court of Guilford County, North Carolina. Further, they alleged that the remainder interest in another 225 shares of such stock was wrongfully sold by the respondent Trustees to the testator's widow in 1923 for the sum of $45,000.

The Trial Court held that the 1921 sale of the first 225 shares of such stock to raise cash to pay debts was valid and the Circuit Court of Appeals affirmed. No question is raised in this petition with respect to that sale.

With respect to the second 225 shares the Trial Court held that the testator did establish a charitable trust by Item Fifth of his will and that the sale of the remainder interest therein by the respondent Trustees to the testator's widow was unauthorized and void and the Circuit Court of Appeals affirmed.(1) The Trial Court set off against the respondent's recovery the $45,000 already paid and as to this the Circuit Court of Appeals reversed. Finally, the Circuit Court of Appeals remanded the case for a determination of the precise present avails of the specific legacy of the remainder interest in 225 shares of the 1919 Vick Chemical Company.

Only questions of law relating to the construction of a North Carolina will and the administration of a North Carolina estate are involved.

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(1) The complaint alleged fraud and conspiracy, which charges were dismissed. The District Judge said (R. 141):

> "* * * I am fully convinced that Mrs. Richardson and her children had no intention of defrauding anyone, and especially the church and its benevolent causes to which they and their relatives had been, and still are, closely identified. They were advised by counsel of ability and character that the things done by them were legal, they had a right to rely upon that advice and they did rely upon it. The evidence shows that the defendants are people of the highest character and I do not believe for a moment that anyone of them would knowingly commit a fraud against the plaintiffs or either of them. They made no misrepresentation of any fact nor did they conceal or withhold any knowledge where it was their duty to speak. Their transactions were considered and deliberate, open and aboveboard. The parties with whom they dealt were intelligent and everyday business men of large affairs, persons not so easily deceived. The charges of fraud and every cause of action based thereon are dismissed."

The Circuit Court of Appeals agreed with the Court below that no fraud had been shown with respect to the transaction (R. 276).

B. Summary of the Facts.

On September 18, 1919, the will of Lunsford Richardson, Sr., was admitted to probate by the Superior Court, Guilford County, North Carolina, the place of the decedent's domicile. Mr. Richardson left a widow and five children surviving (Finding 5), and the widow and the two sons qualified as Executors on October 20, 1919 (Finding 6). Item Fifth of the testator's will reads (R. 240):

> "FIFTH. I give and bequeath to my beloved wife, Mary Lynn Richardson, eight one-hundredths interest in the Vick Chemical Company. At the death of my said wife it is my desire that of the said eight one-hundredths interest so devised to her, three one-hundredths thereof shall be and become absolutely the property of the Trustees of the First Presbyterian Church, and the profits or dividends arising therefrom shall be used by the said Trustees for the benefit of Home and Foreign Missions and the benevolent causes of the church, in such proportion as the Trustees deem best. The remaining five one-hundredths interest I desire to be distributed equally among my five children, herein named, each receiving one share thereof in fee simple."

Item Seventh of the will authorized the legatees to sell their legacies and set forth a formula whereby the sale price should be fixed. The Circuit Court of Appeals found that the remainder interest in the stock "was worth under the formula provided in the will only about $26,000" (R. 268).

In 1920 the First Presbyterian Church of Greensboro conducted a city-wide canvass to raise funds to enlarge its buildings. Not being entirely successful, the question arose as to the right of the respondent Trustees to sell the legacy in question. Whereupon the testator's widow conferred with an "eminent member of the Greensboro bar," Col. F. B. Hobgood, Jr., who advised that the bequest in question "was the property of the First Presbyterian Church of Greensboro and could be sold by the Trustees of said church"

(Finding 20). After various communications the Elders and Deacons of the First Presbyterian Church at a joint meeting duly called appointed an investigating committee to consider the matter (Finding 22). A. M. Scales, Esq. was a member of this committee and acted as attorney therefor. The committee met, investigated (Finding 23), and thereafter recommended the sale of said remainder interest for the negotiated price of $45,000 (Finding 24), which represented the value of the remainder interest plus the widow's life estate as computed by the formula set forth in the will. This recommendation was duly adopted and the sale approved by the Elders and Deacons of the church in joint session December 17, 1922 (Findings 24-25). On February 26, 1923, the widow paid the $45,000 to the three Church Trustees (Finding 25), two of whom are respondents herein including "R. R. King, an outstanding lawyer." On March 8, 1923, the bill of sale conveying all their interest and all the interest of the Church was executed by the Church Trustees and on March 16, 1923, this was recorded (Finding 25). Subsequently the congregation of the Church was apprised of the sale and authorized the use of the proceeds to purchase real estate (Finding 33). The widow conveyed this remainder interest and her life estate in such stock to her five children for the price she paid the Church (Finding 27).

On March 1, 1923, the executors filed their final account, which was audited and approved (Finding 18).

The courts below held the sale null and void and ordered the petitioners some 19 years later to deliver to the respondent Trustees the specific legacy and increment.[2]

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(2) The judgment is against the Vick Chemical Company and the two executors. It is not against the executors as individuals (R. 284). The executors parted with the bequest in 1923. Neither the First Presbyterian Church which at the time of the sale claimed title to the legacy nor the purchasers thereof nor those now in possession of the property are parties to this suit.

Necessarily, therefore, the questions presented are whether the federal courts in construing the will and in reviewing the administration of the aforesaid North Carolina estate have decided important questions of North Carolina law in a way that conflicts with the applicable North Carolina statutes and decisions.

Questions Presented

1. Whether the courts below followed the North Carolina statutes in force since 1796 and applicable decisions in holding that the bequest in question constituted a gift to the Trustees of the First Presbyterian Church of Greensboro upon an express trust *"to be held by them for special purposes beyond the control of the congregation"* (R. 271) rather than an absolute gift to that Church.

2. Whether the courts below followed the North Carolina statutes and applicable decisions in holding that the Church Trustees exercised the power of sale in derogation of the trust and did not make a valid sale where the *"transactions were considered and deliberate, open and aboveboard"* (R. 141).

3. Whether the courts below followed the North Carolina statutes and applicable decisions in holding that this action is not barred by limitations, laches or estoppel.

4. Whether the courts below followed the North Carolina statutes and applicable decisions in holding the corporate defendant liable for the transfer of the stock in question.

Reasons for Granting the Writ

The Circuit Court of Appeals has decided an important question of local law relating to trusts and bequests to an ecclesiastical body in a way probably in conflict with applicable local decisions. This is a case where the jurisdiction of the District Court is based solely on diversity of citizenship. It involves questions arising out of the administration of the estate of a North Carolina decedent and the right to succeed to the ownership of personal property, matters which this Court has said are "peculiarly matters of state law." *Harris* v. *Zion's Bank,* 317 U. S. 447, 450. The accident of diversity should not lead to a different result than would have been reached in the courts of North Carolina.

In the case at bar the Circuit Court of Appeals did not follow the applicable statutes or decisions of the Supreme Court of North Carolina. Circuit Judge SOPER in his dissenting opinion, which relies wholly on the North Carolina statutes and decisions, indicated clearly that his fellow judges had not followed the applicable local law, saying:

> "The decisions of the highest court of North Carolina should govern us in this case" (R. 291).

This squarely puts in issue the point that the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. It is of public importance that this Court resolve this doubt, otherwise there will be continuous conflict between the federal rule as represented by the majority opinion and the state rule of North Carolina with respect to the questions raised in this petition—a result which this Court has sought to prevent. *Erie Railroad* v. *Tompkins,* 304 U. S. 64; *Fidelity Trust Co.* v. *Field,* 311 U. S. 169, 180-181. This case, like *Fidelity Trust Co.* v. *Field,* involves:

"practical aspects of great importance in the proper administration of justice in the federal courts."

The dissenting opinion is found in the Record, pages 287 to 293.

The following points demonstrate in particular that the majority opinion is in conflict with the applicable local law of North Carolina.

1

The gift was outright to the First Presbyterian Church of Greensboro.

In his will the testator expressed his desire that on the death of his widow three one-hundredths interest in the stock of the Vick Chemical Company—

> "shall be and become absolutely the property of the Trustees of the First Presbyterian Church, and the profits or dividends arising therefrom shall be used by the said Trustees for the benefit of Home and Foreign Missions and the benevolent causes of the church, in such proportion as the Trustees deem best."

Insofar as this language created an enforceable interest in anyone, it was in favor of the ecclesiastical body existing under North Carolina law and known as the "Trustees of the First Presbyterian Church." This is an entity existing not under the general corporation laws of North Carolina, but under statutes which were first enacted in 1796. The text of these statutes is now found in C. S. 3568-71 (Appendix). Under these statutes the ecclesiastical body may appoint trustees to receive donations in their own names on behalf of the church and such trustees, acting for the church in their own names, may sell its real and personal property when directed by such church, or its committee or body having charge of its finances.

The North Carolina courts have long recognized that the effect of these statutes is to make a religious congregation a corporation, sometimes referred to as a quasi corporation.[3] This has been determined in *Trustees* v. *Dickenson,* 12 N. C. 189 (discussion on p. 200), decided in 1827; *Lord* v. *Hardie,* 82 N. C. 241 (1880); *St. James* v. *Bagley,* 138 N. C. 384 (1905); *Conference* v. *Allen,* 156 N. C. 524 (1911), and *Way* v. *Ramsey,* 192 N. C. 549 (1926).

There are various ways of referring to the corporation so created, according to the denomination and practice of the religious body. Thus, in *St. James* v. *Bagley,* 138 N. C. 384 (1905), where an Episcopal church was involved, the corporation is referred to as *The Wardens and Vestry of Saint James' Parish.* In *Tilley* v. *Ellis,* 119 N. C. 233, 243 (1896), the name of the Northern Methodist Church was held to be *"Trustees of the Methodist Episcopal Church."* In the case of a Presbyterian church the proper mode of reference to the corporation is to the *"Trustees of the ..... Presbyterian Church."* A gift in those terms is not a gift to any individuals as trustees, but is a gift to a corporation by that name. It is the same, for example, as a gift to the President and Fellows of

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(3) The use of the word quasi in speaking of these religious corporations does not mean that they are *de facto* corporations. It is used instead to indicate that they are not ordinary corporations existing under the general corporation act, but that they are special corporations deriving their existence from the early legislation with respect to religious bodies. This matter is discussed in Zollman, American Church Law (1933), §§ 122, 123. In the latter section, the author says:

> "Many such donations [to churches] have been declared void by the court. This was felt as an evil, and the Legislatures were appealed to for a remedy. The remedy applied was to declare all such bodies corporations for the purpose of taking property. Such statutes were passed even before the Revolution. Thus the Pennsylvania statute creating such quasi corporations dates back to 1731, while Maryland followed in 1779, Massachusetts in 1811, and Vermont in 1814. Similar statutes had been passed in New Hampshire, North Carolina, and Tennessee, * * *"

Harvard College. That is the accurate legal name of the corporation which conducts Harvard University.

In the present case, the gift to the *"Trustees of the First Presbyterian Church"* was a gift to an "ecclesiastical body" existing under North Carolina law. The gift was plainly to the local Greensboro church because its name was accurately used in the will. As Judge SOPER says in his dissent (R. 288):

> "The bequest to the trustees of the church in this case was therefore in effect a bequest to the church, as the testator, who was very familiar with the organization of the Presbyterian Church, well knew."

The will in this case was drawn for an eminent layman by a lawyer who was an active member and officer of such church (R. 132) and there is every reason to think and the presumption is that when they used accurate legal language they meant the words to be so read.

The references in the will to the Trustees do not make a gift to, or confer powers on, any persons individually as trustees, but are the means of making a gift to such "ecclesiastical body" existing and so designated under North Carolina law. That this is the correct construction of the language used is emphasized by the testator's use of the word *"absolutely,"* which word is used in the statute (C. S. 3570), to describe the church's estate in donations. Judge SOPER said (R. 288):

> "One does not give property to another absolutely when one intends to give it to him as trustee."

The testator and his lawyer knew what language to use to create a trust (Items Eight and Nine of the will).[4]

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(4) This is pointed out in Judge SOPER's dissenting opinion, where he says (R. 289):

> "No one interested in the establishment of a trust in this case satisfactorily explains why the testator did not use language of the same unmistakable clarity in the fifth paragraph of the same document if there also he intended to leave property in trust and not to make an absolute gift."

Church law is peculiarly a matter of local competence. The failure of the Circuit Court of Appeals to follow the statutes and law of North Carolina in this respect is fundamental to this case. For if there is a trust of any sort it must, under North Carolina law, be the church corporation which is the trustee, for the gift is to it and to no one else. *But that corporation is not a party to this suit.* The individual plaintiffs were given nothing by the will. They do not sue as trustees of the church, but as trustees of a separate charitable trust. The respondent corporate agencies have no standing except (at most) through their trustee, the church corporation. The Court will not fail to see the significance of the fact that the church corporation itself, controlled as it is by the Session and members, has not chosen to become a party to this suit.

Even if the church corporation were a party here, however, there would still be no trust under North Carolina law. The decision of the Circuit Court of Appeals that there is a trust is in conflict with the decisions of the North Carolina Supreme Court, notably with *St. James* v. *Bagley,* 138 N. C. 384 (1905), and *Williams* v. *Thompson,* 216 N. C. 292 (1939). The conflict with the latter case is clear and striking. The testator there devised land "to be used by the stewards or legal representative of the said Church in the Town of Plymouth *as a parsonage for the minister and for no other purpose,* in order to secure the possession of my burying ground to the aforesaid Church and to its keeping and care." The trustees of the Church conveyed their interest to a third person. In holding that no trust was created with respect to the property, the Court said (p. 293):

> "The language contained in the will, indicating that the property was to be used as a parsonage for the minister of the church in order to secure the possession of the burying ground to the church and to its keeping and care, cannot be held to have the effect of impressing a trust upon the legal title (*St. James*

> v. *Bagley,* 138 N. C. 384, 50 S. E. 841) * * *. The language used in the will expresses the wish of the testatrix as to future use of the land, but it cannot be given the legal effect of creating a trust such as to require the aid of a court of equity to enforce its administration."(5)

The court below endeavored in its opinion to distinguish the decision in *Williams* v. *Thompson.* It said (R. 272):

> "Since the provision of a parsonage for the minister is one of the ordinary uses made by a church of its property the direction amounted to no more than a direction as to how the grantee of property should use it."

The weakness of this distinction serves, we submit, to emphasize the conflict between the decision below and that of the Supreme Court of North Carolina in *Williams* v. *Thompson.* In the present case, the gift was "*for the benefit of Home and Foreign Missions and the benevolent causes of the church.*" It is difficult to see how it can be said that these are not among the ordinary purposes and objectives of the church. This point is well made by Judge SOPER in his dissenting opinion, where he says (R. 290):

> "There is no legal distinction between a gift of property to be used for the benevolent causes of a church and of property to be used for a parsonage, for both are within the corporate purposes. It was doubtless in view of this fact and of the established

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(5) This is typical of other North Carolina decisions. Thus, in *Blue* v. *Wilmington,* 186 N. C. 321 (1923), property was conveyed to "the Board of Aldermen of the City of Wilmington, for the purpose of a public park for the citizens' use and pleasure in fee simple." In *Hall* v. *Quinn,* 190 N. C. 326 (1925), land was conveyed to the Trustees of the James Sprunt Institute "to be used for the purposes of education, and for no other purposes." In both cases the Court held that no trust was created and that the conveyances were in fee simple.

> state law that competent counsel, learned in the law of North Carolina, advised the church in 1923 that the sale of the stock by the church was within its rights. The decisions of the highest court of North Carolina should govern us in this case."

It is hard to believe that the North Carolina Supreme Court would hold that a gift for the use of maintaining a parsonage was an outright gift for the purposes of the church, and yet would hold that the benevolent causes of the church[6] are not as much a part of the church's activities as the maintenance of a parsonage.

2

The sale in question was valid and enforceable.

The majority opinion below held that the petitioners are liable for participation in the sale since the proceeds were as a matter of law to be diverted from their proper use, stating (p. 16) that the defendant company was "*likewise chargeable with knowledge*" and (on p. 25) that the sale amounted to nothing "*since all parties were charged with notice that the remainder was subject to the trust.*"

The courts below also found that both sides were represented by outstanding attorneys of North Carolina who agreed that the sale was proper; that the respondent Trustees executed a bill of sale which was recorded after the advisability of selling was investigated at length and considered by two meetings of the Church Session and duly

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(6) The Circuit Court of Appeals (R. 273) affirmed the Trial Court in holding that:

> "The gift as shown above was to the Trustees of the First Presbyterian Church in trust for the Home and Foreign Missions and benevolent causes of that church."

approved. The majority opinion states (p. 16) "that they (petitioners) had no fraudulent intent and honestly believed that they were acting lawfully does not affect the matter." In other words, the Court below held that even though the "transactions were considered and deliberate, open and aboveboard" (R. 141) and all parties used due diligence and reasonably believed that the transfer was proper, nevertheless the defendants are liable.

This is directly contrary to the North Carolina law. In *Carswell* v. *Creswell*, 217 N. C. 40 (1940), the Court upheld an alleged irregular sale by trustees where it was entered into after diligent investigation, publicly and for a fair price, upon several grounds, one being (p. 47):

> "We think the deed of the trustees bound all who had an interest in the land if not the community meeting, and other matters set forth in the record were in the nature of an estoppel."

Section 297, *Comment l*, of the *Restatement of the Law of Trusts* provides in part:

> "If the transferee has notice of the existence of a trust and of the terms of the trust, and after using due diligence to ascertain whether the transfer is in breach of trust reasonably believes that the facts are such that the transfer is not in breach of trust, he takes free of the trust if the other requirements of *bona fide* purchase are complied with."

This proposition of law is emphasized in North Carolina by its statute (C. S. 1864 (e)(2), (f) and (g)), providing that only "bad faith" will render a participant liable for the diversion of the proceeds of a sale by a fiduciary.

The majority opinion below (pp. 15-18) relies upon cases where the transfer was not made after diligent investigation, publicly and in good faith.

3

This action was barred under North Carolina law.

A. Constructive Trusts Are Immune From Attack After Ten Years Under North Carolina Law.

The basis of liability, the majority opinion holds, is that a constructive trust arose upon the sale in 1923 (R. 275, 276, 285). The Court below said (R. 280):

> "What occurred, however, was • • • a sale of the remainder by the trustees to the holder of the life interest under such circumstances as to constitute a breach of the trust and impress a constructive trust upon the remainder in the hands of the holder of the life interest and her transferees."

In North Carolina the law is well settled that a constructive trust cannot be attacked after 10 years. In *Teachey* v. *Gurley*, 214 N. C. 288 (1938), it is said (pp. 293-4):

> "Actions to enforce constructive or resulting trusts are based upon the original wrongful or tortious act of the person holding title by reason of which equity impresses a trust upon his title. No contract relation exists. A cause of action arises when the wrong is committed. Therefore the statute of limitations immediately begins to run and the 10-year statute applies unless sooner barred under the doctrine of laches. C. S. 445."

It makes no difference whether the trustee sues or a beneficiary sues. *Carswell* v. *Creswell*, 217 N. C. 40, at 46 (1940); *Clayton* v. *Cagle*, 97 N. C. 300, at 303 (1887); *Hayden* v. *Hayden*, 178 N. C. 259 at 264 (1919).

The cases relied upon in the courts below by the respondents are not cases where the remainderman sold

his remainder interest. *Pritchard* v. *Williams,* 175 N. C. 319 (1918), was a case where the plaintiff's remainderman had done nothing and the Court found (bottom p. 324) the defendants were "not purchasers for value and all took with notice." The other cases, such as *Wooten* v. *Railroad,* 128 N. C. 119 (1901), and *Baker* v. *R. R.,* 173 N. C. 365 (1917), likewise did not involve constructive trusts. There also the remainderman had taken no action. Here as Judge SOPER well says in his dissenting opinion (p. 34):

> "If the transfer of the stock and the disposition of the proceeds of sale constituted a breach of trust and gave rise to a constructive trust impressed upon the stock in the hands of the purchasers, it took place in 1923 when they acquired it and the purchase price was used to aid in the building of a new church; and limitations began to run in that year."

Certainly since the respondent Trustees of the Church sold their remainder interest in 1923 in good faith and for its full value they could not now successfully attack it in the North Carolina courts.

B. A Special Statute in North Carolina Bars This Action Against the Petitioning Executors.

C. S. 150 of the North Carolina Code provides that executors at the end of two years shall distribute the estate. C. S. 109 provides that executors may be required to file their accounts at any time after two years. C. S. 147 provides that legacies may be recovered by petition in the Superior Court at any time after two years from the date of qualification of the executors.

These executors qualified October 20, 1919. They were therefore required to distribute by October 20, 1921.

In *Edwards* v. *Lemmond,* 136 N. C. 329 (1904), the Court held that the North Carolina statute of limitations began

to run in favor of executors at the end of two years from the date of qualification. C. S. 445, the Court held, fixed a limit of ten years within which suit might be brought against an executor. *Pierce* v. *Faison,* 183 N. C. 177 (1922), is to the same effect. This is the unquestioned law in North Carolina. While the prevailing opinion below ignored this well settled North Carolina law, Judge SOPER in his dissenting opinion says (pp. 34, 35):

> "So far as the defendant executors are concerned the defense of limitations rests upon the North Carolina statutes as interpreted in *Edwards* v. *Lemmond,* 136 N. C. 329 • • •. The court said that at the end of two years the law makes the demand and puts an end to the express trust, although no express demand is made by any interested party upon the executor in default, and that an action will then lie at the instance of anyone entitled to a settlement of the estate."

The decision on this point, therefore, would seem to be clearly in conflict with the law established by the Supreme Court of North Carolina.

C. Limitations, Laches and Estoppel.

The probate of the testator's will in 1919 "became general knowledge of the church" (R. 158). Aubrey L. Brooks, one of the respondent Trustees, drew the testator's will and was a member of such Church (opinion of Trial Judge, p. 2). Mr. Brooks was also an attesting witness to the will. He was also a member of the Building Committee of the aforesaid Church and knew of the sale in question. On May 9, 1932, Mr. Brooks was elected a Trustee of said Church. Respondents King and Vaughn were both serving as Trustees of the Church at the time of the sale and signed the aforesaid bill of sale.

No excuse is given for the long delay in questioning the transaction. The position of the purchasers has changed materially. In *Rand* v. *Gillette,* 199 N. C. 462, 463, it is said that an estoppel is based upon an everyday application of the golden rule:

> "It requires that one should do unto others as in equity and good conscience he would have them do unto him if their positions were reversed."

Stale claims are not looked upon with favor by the North Carolina courts. *Teachey* v. *Gurley,* 214 N. C. 288 at page 295.

Furthermore, even if the parties to the sale in question could be considered to have been parties to a diversion of the trust funds (which they were not) it would not help these respondents. Respondent Brooks was an independent Trustee. He was elected May 9, 1932. He was then in a position to sue. In *Curtis* v. *Connly,* 257 U. S. 260, Mr. Justice HOLMES, writing for the Court, says at page 264:

> "Even if otherwise the statute of limitations would not have run, which we do not imply, knowledge of the facts by the new directors was knowledge by the bank, and none the less that according to the bill they in their turn were unfaithful."

In *Cameron* v. *Hicks,* 141 N. C. 21 (1906), a trustee died but the court held that his heirs succeeded to the trust as independent trustees so that the statute barred a subsequent suit by a beneficiary against a purchaser who held adversely by virtue of an irregular transfer from the original trustee. Section 327 of the *Restatement of the Law of Trusts* is to the same effect.

C. S. 441 of the North Carolina Code bars an action by an independent trustee in a case such as this in three years. Since it is clear that respondent Brooks was elected

a Trustee in 1932 this action would in any case under North Carolina law be barred in 1935. Furthermore, the North Carolina courts hold that where a trustee is barred by the statute of limitations, the cestuis are also barred, since the cestuis are bound by the acts or failure to act on the part of the trustee. *Carswell* v. *Creswell*, 217 N. C. 40, 46; *Clayton* v. *Cagle*, 97 N. C. 300, 303 (1887). In *Muse* v. *Hathaway*, 193 N. C. 227 (1927), the court says (p. 230), "The life interest did not prevent the statute from running."

Certainly the North Carolina courts would not have permitted this action to be maintained. In *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223 (1940), where this Court was considering the statute of limitations of Ohio as affecting parties similarly situated, this Court pointed out that there should not be two divergent or conflicting systems of law, one to be applied in the state courts and the other to be availed of in the federal court only in case of diversity of citizenship.

4

The petitioner corporation is under no liability to the respondents.

Section 1864(g) of the North Carolina Code provides that a corporation is not liable in transferring securities held by fiduciaries unless it is done "in bad faith." Here the stock in question was transferred out of the names of fiduciaries (R. 39). The facts found completely eliminate bad faith (R. 37, 276). This necessarily bars liability.

The cases relied upon in the courts below, *Baker* v. *R. R.*, 173 N. C. 365 (1917), *Wooten* v. *The Railroad*, 128 N. C. 119 (1901), and similar cases, were all decided before the aforesaid statute was passed. Such statute became effec-

tive February 27, 1923. The statute changed the rule. 1 N. C. Law Rev. 291. The transfer in question was made on February 28, 1923, one day after such statute became effective (Finding 27, R. 120).

Again, Defendants' Exhibit 5-F (II, Tr. 67-b) shows that the 1925 Vick Chemical Company of Delaware assumed liabilities of only $49,915.15 of its predecessor company and under the law of North Carolina it could not in the courts of such state be held liable to the respondents here. *McAllister* v. *Express Company*, 179 N. C. 556 (1920). Furthermore, any liability on the part of the successor company if there had been any would long since have been barred under the North Carolina law. *Standard Trust Co.* v. *Commercial National Bank*, 240 Fed. 303 (C. C. A. 4).

CONCLUSION

Where, as here, one of the judges of the Circuit Court of Appeals in his dissent has taken pains to point out that the majority opinion has not followed the applicable State law, this Court should grant certiorari to resolve the conflict between the Federal and State courts.

Respectfully submitted,

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